(16) (14) (13)

NOS. 91-543; 91-558; 91-563
Consolidated

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

THE STATE OF NEW YORK, THE COUNTY OF ALLEGANY, and THE COUNTY OF CORTLAND, NEW YORK

Petitioners,

v.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY, IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS, STATES OF WASHINGTON, NEVADA AND SOUTH CAROLINA

KENNETH O. EIKENBERRY
Attorney General
State of Washington

T. TRAVIS MEDLOCK
Attorney General
State of South Carolina

4407 Woodview Drive, 4th Floor
P. O. Box 40117
Olympia, WA 98504-0117
(206) 459-6157
Attorneys for Intervenors-Respondents

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

ALLEN T. MILLER, JR.*
Assistant Attorney General for Washington
Special Deputy Attorney General for Nevada

JAMES PATRICK HUDSON
Deputy Attorney General for South Carolina

* *Counsel of Record*

QUESTION PRESENTED

Did congressional enactment of the Low-Level Radioactive Waste Policy Act of 1980, and its 1985 Amendments, which ratifies and implements the unanimous agreement of all the states of the Union to fairly allocate the responsibility for the nation's low-level radioactive waste disposal capacity among themselves, violate the Tenth Amendment or the Guarantee Clause, Article IV, § 4 of the United States Constitution?

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

STATUTES AND REGULATIONS

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES (Continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES (Continued)

NOS. 91-543; 91-558; 91-563
Consolidated

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

THE STATE OF NEW YORK, THE COUNTY OF ALLEGANY, and THE COUNTY OF CORTLAND, NEW YORK

Petitioners,

V.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY, IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS, STATES OF WASHINGTON, NEVADA AND SOUTH CAROLINA

STATEMENT OF THE CASE

A. Introduction

The states of Washington, Nevada, and South Carolina (sited states) have been the hosts of the only operating low-level radioactive waste[1] disposal sites since 1978. In 1980 and again in 1985, the state of New York and the other states of the Union entered into an agreement with the sited states to fairly and equitably share the burden of low-level radioactive waste disposal. The agreement among the states was unanimously ratified by Congress and is commonly known as the Low-Level Radioactive Waste Policy Act of 1980 and the Low-Level Radioactive Waste Policy Amendments Act of 1985. Despite its comity in 1980 and 1985, by virtue of this lawsuit the state of New York now challenges the validity of, and seeks to rescind, the agreement encompassed in the 1980 Act and the 1985 Amendments Act. We begin by describing the history of low-level radioactive waste disposal in the United States.

B. History of Disposal

In the 1940s and the 1950s, low-level radioactive waste generated in the United States was regulated solely by the federal government and was primarily disposed of in the ocean. After studies in the 1950s raised questions regarding the efficacy of ocean dumping of low-level radioactive waste, the practice was slowly phased out. In 1959, Congress amended the Atomic Energy Act, Pub. L. No. 86-373, codified as amended, 42 U.S.C. § 2021, in order to engage the states in a partnership recognizing the states' interests in

---

[1]Low-Level radioactive wastes include materials contaminated with small amounts of radioactive substances, such as clothing, packaging, animal carcasses, medical fluids, power reactor liquids, luminous watch dials, smoke alarms, research and diagnostic materials. These wastes need to be isolated from humans for between 60 to 500 years. *Low-Level Waste: A Program for Action, Final Report of the National Governor's Association Task Force on Low-Level Radioactive Waste Disposal (July, 1980)*, Joint Appendix, 110a.

the peaceful uses of nuclear materials. Based on the 1959 Amendments, the Atomic Energy Commission granted the requests of "Agreement states" to regulate the disposal of low-level radioactive waste. A land-based disposal regimen began in 1962 when the nation's first site for the land disposal of commercial low-level radioactive waste was licensed and opened in Beatty, Nevada.[2]

Between 1962 and 1971, five more commercial low-level waste disposal sites were opened in the United States at Maxey Flats, Kentucky (1963), West Valley, New York (1963), Hanford, Washington (1965), Sheffield, Illinois (1967) and Barnwell, South Carolina (1971).[3] The Illinois, Kentucky, and New York facilities closed between 1975 and 1978 due to technical water management problems.[4] Since 1979, the only established and open disposal sites for low-level radioactive waste are those located in Washington, Nevada, and South Carolina; the rest of the country transports its low-level radioactive waste to these states.

The obvious risks inherent in this limited disposal system became acute in 1979 when the state of Nevada twice temporarily closed the Beatty site due to the improper handling within the state of several low-level radioactive waste shipments being sent to the site. In October 1979, similar transportation and packaging problems caused the governor of Washington to temporarily close the Hanford site.[5] The closures of the Nevada and Washington disposal sites caused the share of low-level waste being accepted in South Carolina to rise to 80 percent of the entire nation's low-level waste. Because of this result, the governor of South Caroli-

---

[2]M. Burns, Low-Level Radioactive Waste Regulation (1988), pp. 28-40.

[3]H.R. Rep. No. 314, 99th Cong., 1st Sess., pt. 2 at 17, *reprinted in* 1985 U.S. Code Cong. & Ad. News at 3005.

[4]Id. at 3006.

[5]Id.

na ordered the Barnwell site to accept only one-half the annual amount of waste that it was then receiving.[6]

The inadequacy of existing disposal capacity for low-level radioactive waste was at this time a major concern of both the sited and unsited states. A national disposal system with only three sites for waste from all 50 states was extremely vulnerable to widespread health and safety crises.[7]

The sited states were particularly unhappy with the inequities of the existing situation. The sited states believed it was unfair that they be required to provide disposal facilities for all 47 of the unsited states. In addition to the limitation imposed by the South Carolina governor in 1979, the voters in the state of Washington approved a ballot initiative in 1980 that banned out-of-state low-level radioactive waste from Hanford.[8]

C. 1980 State Agreement

In the wake of this crisis, Congress began to consider federal solutions to the problem. Congress initially proposed a policy to construct low-level radioactive waste disposal facilities on federal land in several states.[9] However, *the states* asked that Congressional action be deferred in order to allow *the states* to develop a low-level radioactive waste disposal policy. The states, *in the interest of federalism*, preferred that they be in charge of the low-level waste disposal problem, since siting waste disposal facilities involved land use and public health issues traditionally decided at the state and local level of government. Congress agreed to defer to the states wishes. Given this opportunity

---

[6]*Id.* See also Affidavits of Governors Gardner, Campbell and Miller, Joint Appendix, pp. 142a-155a.

[7]*Id.*

[8]The initiative was declared unconstitutional. *See Washington State Building and Construction Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982).

[9]Low-Level Nuclear Waste Burial Grounds: Hearing Before the Subcommittee on Energy Research and Production, House Committee on Science and Technology, 96th Cong., 1st Sess. 2 (1979).

by Congress, the states acted with alacrity. The National Governors Association (NGA) created a task force to review and formulate state policy regarding low-level radioactive waste. Another state-composed organization called the State Planning Council on Radioactive Waste Management, recommended to President Carter that the national policy on low-level radioactive waste should be that every state is responsible for the disposal of low-level radioactive waste generated within its boundaries, and that states may enter into interstate compacts to carry out the responsibility.[10]

Based on the states' recommendation, President Carter, therefore, did not endorse his administration's earlier proposal for a possible federal takeover of the low-level radioactive waste disposal problem. Rather, President Carter supported the actions already taken by the governors to promote solution of this problem at the state level.[11] The National Conference of State Legislatures and the National Governors Association also adopted this recommendation. The NGA Task Force concluded that the siting of low-level radioactive waste facilities involved primarily state and local land use and public health issues and should be resolved at those governmental levels.[12]

Thus the states themselves developed the policy which recommended solving the problem of low-level radioactive waste disposal capacity on a regional basis, whereby several states would enter into interstate compacts to establish a new disposal facility for waste generated only within the Compact region. In compliance with the states' recommendations, Congress enacted the Low-Level Radioactive Waste Policy Act of 1980, Pub. L. No. 96-573, which was codified at 42 U.S.C. §§ 2021b-2021d (1980 Act).[13]

---

[10]1985 U. S. Code Cong. & Ad. News at 3007.

[11]E. Colglazier, Jr., *The Politics of Nuclear Waste* (1982), p. 38.

[12]1985 U.S. Code Cong. & Ad. News at 3007.

[13]*Id.*

The 1980 Act gave the regional interstate Compacts the authority to restrict, after January 1, 1986, use of the regional disposal facility only to low-level radioactive waste generated within the region. In effect the "unsited" states agreed to a deadline of January 1, 1986 to establish their own disposal facilities.[14]

D. 1985 State Agreement

As 1986 approached, the states began to realize that finding sites within the unsited regions probably could not be accomplished by the deadline, although significant progress was achieved in developing regional interstate disposal Compacts. Thirty-nine states had entered into seven compacts by 1985, but progress on achieving Congressional ratification of the compacts was slowed by the fact that only the Northwest,[15] Southeast[16], and Rocky Mountain Compact[17] states would have had disposal capacity available as of January 1, 1986; the other non-sited compact and individual states would not have had any place to send their waste for disposal after that date. The state-generated process envisioned in the 1980 Act was grinding to a halt, creating a crisis similar to that which had existed in 1979.[18]

The sited states threatened that they would close their facilities to all waste if Congress did not pass acceptable state-generated legislation by January 1, 1986. The states again under the auspices of the National Governors Association took the lead and developed compromise legislation under which the states of Washington, South Carolina, and Nevada agreed to continue to accept all of the nation's low-

---

[14]*Id.*

[15]The Northwest Interstate Compact includes Washington, Oregon, Idaho, Montana, Utah, Alaska, and Hawaii.

[16]The Southeast Compact includes South Carolina, North Carolina, Virginia, Tennessee, Mississippi, Alabama, Georgia, and Florida.

[17]The Rocky Mountain Compact includes Nevada, Wyoming, Colorado, and New Mexico.

[18]1985 U.S. Code Cong. & Ad. News at 3007.

level radioactive waste for an additional seven years in exchange for incentives and penalties that would better guarantee that new sites would be developed in the unsited states.[19] The state-generated and approved National Governors Association proposal served as the foundation for Congressional action. In 1985, Congress took the state-developed compromise and unanimously passed the Low-Level Radioactive Waste Policy Amendments Act of 1985 (1985 Amendments Act), thereby averting a national low-level radioactive waste disposal crisis. All of the sited and unsited states, including New York, strongly urged Congress to adopt the states' agreement. On December 19, 1985, the compromise legislation passed unanimously and seven interstate compacts were ratified.[20]

The 1985 compromise legislation required that the unsited states meet specified milestones during the interim access period from 1986-1992, in order for the waste generators within their borders to receive continued access to disposal facilities. The sited states would be permitted, on an annual basis, to cap the amount of waste disposed of at their facilities and they would also be permitted to impose fixed monetary surcharges on any waste accepted for disposal from outside their respective regions.[21]

The 1985 Amendments Act creates several incentives for the unsited states to develop low-level radioactive waste disposal sites. Under the compromise, the sited states and compacts are authorized to discriminate in interstate commerce by charging higher disposal fees to waste originating from outside the sited states or compact region. 42 U.S.C. § 2021e(d)(1). Unsited states and compact regions are authorized to receive a refund of 25% of the disposal surcharge fees to assist in disposal site construction costs. 42 U.S.C. § 2021e(d)(2). Furthermore, the sited states may deny access

---

[19] *Id.* at 3008.

[20] 131 Cong Rec. H38115-38120; S38403-38425.

[21] 1985 U.S. Code Cong. & Ad. News at 3008-3009.

to waste originating from a state or region which is not complying with milestones established to show that a state or region is making progress to site a disposal facility. 42 U.S.C. § 2021e(f). Interstate compacts retain the right to restrict access from out-of-region waste. 42 U.S.C. § 2021d(c). Finally, should the states not adhere to the agreed schedule, the states agreed to "take title" to the waste after 1996. 42 U.S.C. § 2021e(d)(2)(C).

Under the 1985 Amendments Act, significant progress has been made by several states and Compacts in developing new low-level radioactive waste disposal capacity. The states of California, Arizona, North Dakota, and South Dakota have formed the Southwest Compact, with California as the host state. Illinois is the host state of the Central-Midwest Compact, made up of Illinois and Kentucky. Nebraska is the host state of the Central Compact, which includes Nebraska, Kansas, Oklahoma, Arkansas, and Louisiana. The Appalachian Compact with Maryland, Delaware, West Virginia, and Pennsylvania is siting a disposal facility in Pennsylvania. Ohio is the host state of the Midwest Compact,[22] which includes Ohio, Indiana, Missouri, Iowa, Minnesota, and Wisconsin. Texas is a "go-it-alone" state, developing its own disposal site without a regional compact. Each of these Compacts and states has made significant progress toward development of operational low-level radioactive waste disposal facilities in compliance with the 1985 Amendments Act. California, Nebraska, and Illinois have submitted license applications for their disposal facilities to the Nuclear Regulatory Commission. Califor-

---

[22]Originally Michigan was the host state of the Midwest Compact. However, because of Michigan's failure to proceed to site a disposal facility, the Midwest Compact has expelled Michigan from the Compact and the sited states have denied disposal access to Michigan-generated waste for its failure to continue to comply with the 1988 milestone. *See Michigan Coalition v. Griepentrog*, 945 F.2d 150 (6th Cir. 1991) and *MICHRAD v. Griepentrog*, No. 91-1801 (6th Cir. Jan. 24, 1992) (1992 WESTLAW 8818).

nia expects its new disposal facility to be operating before the end of 1992. Joint Appendix, pp. 142a-155a.

In addition, pursuant to the contracting provision[23] of the 1985 Amendments Act, the Northwest Compact and the Rocky Mountain Compact have negotiated a proposed agreement whereby the states of Nevada, Wyoming, New Mexico, and Colorado will have access to the disposal site located in Washington after December 31, 1992. This agreement furthers the 1985 Amendments Act policy to regionalize disposal capacity.[24]

The probability that this process of federalism will result in the orderly development of new low-level radioactive waste disposal capacity throughout the nation has been central to the sited states' decision to provide continued access to the disposal sites for the disposal of low-level radioactive waste generated outside the sited states, pursuant to the states' agreement embodied in the 1985 Amendments Act. Joint Appendix, pp. 142a-155a.

E. Procedural History

In February 1990, the state of New York and the counties of Allegany and Cortland brought suit against the United States in the United States District Court for the Northern District of New York to have the consensus legislation of the 1980 Act and its 1985 Amendments declared unconstitutional. Though it had been part of the unanimous agreement of the states to be responsible for low-level radioactive waste disposal, in the intervening years the state of New York had succumbed to those who say "Not in my backyard."[25] The states of Washington, Nevada, and South Carolina intervened by right, pursuant to Fed. R. Civ. P.

---

[23] 42 U.S.C. § 2021e(e)(1)(F).

[24] Joint Appendix, pp. 142a-155a.

[25] The "Not in my backyard" or NIMBY syndrome is ubiquitous and regularly thwarts siting essential but unwanted public facilities. *See* Rabe, *Low-level Radioactive Waste Disposal and the Revival of Environmental Regionalism in the United States*, 7 Envtl. & Plan. L. J. 171 (1990).

24(e), in order to have the consensus agreement embodied in the 1985 Amendments Act upheld.

Upon motions and cross-motions for summary judgment and dismissal, the district court held that the 1985 Amendments Act was constitutional under the Tenth Amendment and related concepts of federalism. *New York v. United States*, 757 F. Supp. 10 (N.D.N.Y. 1990). On appeal the United States Court of Appeals for the Second Circuit affirmed, concluding that the state-generated 1980 Act and its 1985 Amendments were "paragons of legislative success, promoting state and federal comity in a fashion rarely seen in national politics." *New York v. United States*, 942 F.2d 114, 119 (2nd Cir. 1991). This Court granted certiorari on January 10, 1992.

SUMMARY OF THE ARGUMENT

The premise of New York's challenge to the 1980 Act and its 1985 Amendments is false. New York mischaracterizes the issue before this Court as if Congress directed or forced the states to be responsible for the disposal of low-level radioactive waste. New York attempts to create the impression that such responsibility was foisted upon unwilling states by the federal government, or that the states were commandeered by Congress to assume this responsibility. This characterization is illegitimate, purposefully deceptive, and specious.

Both the 1980 Act and its 1985 Amendments are properly characterized as a voluntary policy agreement among the sovereign states to be responsible for the disposal of low-level radioactive waste on a regional and equitable basis. Congress, for reasons of federalism, deferred to the states to generate the consensus agreement to solve the low-level radioactive waste disposal crises in 1980 and 1985.

Under principles of federalism embodied in the Constitution, the states are entitled to enter into agreements among themselves which can then be ratified and enacted by Congress. The 1980 Act and its 1985 Amendments

are paragons of federalism—Congress deferring to a consensus of all of the states to take responsibility for solving the problem of low-level radioactive waste management.

ARGUMENT

POINT I

THE STATES, CONSISTENT WITH THE TENTH AMENDMENT, UNANIMOUSLY AGREED TO BE RESPONSIBLE FOR LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT.

A. The 1980 Act and its 1985 Amendments Are Models of Cooperative Federalism.

The state of New York and two of its counties ask this Court to review the constitutionality of the Low-Level Radioactive Waste Policy Act of 1980 and its 1985 Amendments. The petitioners' theory is that the Acts interfere with New York's sovereign powers and thus violate principles of federalism under the Tenth Amendment of the United States Constitution.[26] New York argues that the 1980 Act and the 1985 Amendments are Congress's action to foist upon "unwilling" states the unwanted responsibility for managing low-level radioactive waste. The premise of New York's argument is false.

> The passage of the Low Level Radioactive Waste Policy Act in December 1980 established a sound policy framework on which to rebuild an equitable and stable regional [waste] management system. The act was the culmination of a year-long effort by several state officials and organizations, including the National Governor's Association and the State Planning Council, to persuade the federal government to let each state be responsible for assuring the safe management of the

---

[26]Although the Petitioners' claim that the Guarantee Clause, Art. IV, § 4 of the United States Constitution is also violated, this Court has consistently held that challenges to legislation based on the Guarantee Clause are not justiciable. *City of Rome v. United States*, 446 U.S. 156, 182 n. 17 (1980); *Baker v. Carr*, 369 U.S. 186, 228-29 (1962).

> commercial low-level waste generated within its borders. Through asserting their own self-interest by temporarily closing sites and forcing volume reductions, the three states with operating dumps eventually convinced other states, the generators, and the Congress that a lasting solution to the problem of opening new sites was needed, that it should not come from accepting commercial waste at federal sites, and that states could develop the competence to do the job. The fact that the generators include hospitals and research institutions (generating 25 percent of the volume in 1978), industry (24 percent) as well as commercial power reactors (43 percent), and that these generators maintained a united front in their aggressive lobbying was a contributing factor in persuading other state governments to focus on the issue. The spectre of a possible curtailment of essential and popular services proved to be a powerful incentive to responsible action. *But an essential ingredient was the federal government allowing states to generate their own appropriate role and, thereby, to develop a promising solution to a national problem.*

E. Colglazier, Jr., *The Politics of Nuclear Waste* (1982), pp. 202-203 (footnotes omitted) (emphasis added).

Each state as sovereign within its domain, governing its own citizens, and providing for their general welfare asked Congress to defer to the states' sovereign desire to be responsible for low-level radioactive waste generated within their respective borders. The constitutional structure contemplates "an indestructible Union, composed of indestructible states," a structure under which the state and national governments retain a "separate and independent existence." *Texas v. White*, 74 U.S. 700, 725 (1869); *Lane County v. Oregon*, 74 U.S. 71, 76 (1869). Surely the constitutional structure, as contemplated by the Framers, allows the states, as sovereigns, to step forward and agree among themselves as separate, independent, and indestructible entities to solve a national problem. To rule that the states may not so agree would be to "directly displace the States' freedom to structure integral operations" in an area that prior to 1959 was exclusively the province of the national

government. *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976).

Pursuant to the agreement embodied in the 1980 Act and the 1985 Amendments Act, the states have enacted a model of cooperative federalism that allows the states to experiment with various methods of low-level radioactive waste management.

> Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth.

Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring and dissenting). The 1980 Act and its 1985 Amendments are examples of such experimentation.

> *Decentralized regulation of low-level radioactive wastes in the United States constitutes an experiment in regulatory federalism that will test the popular propositions that States can resolve complex environmental problems and that multi-State, regional institutions can serve an effective intermediary role between State and nation.* Under the Low-Level Radioactive Waste Policy Act 1980 (U.S.) and its 1985 amendments, States have received the authority from Congress to enter into interstate compacts to manage disposal of low-level radioactive wastes. The legislation gives States the option of managing their own wastes or forming partnerships with neighboring States, but does impose a series of deadlines, incentives, and sanctions that are intended to accelerate the decision-making process and encourage States to work together in co-operative fashion. It stands as a novel experiment that, if successful, might warrant emulation in other Federal Nation-States such as Australia, Canada, and West Germany or the Federating Nation-States of Western Europe.

Rabe, *Low-level Radioactive Waste Disposal and the Revival of Environmental Regionalism in the United States*, 7 Envtl. and Plan. L. J., 171-80 (1990) (Emphasis added).

In this sense, the states provided the impetus for legislation which would legitimize their responsibility for the creative management and disposal of low-level radioactive

waste. Through interstate compacts, permanent arrangements among the states could be established for the management and disposal of such waste. Congress was quite agreeable in deferring to the auspicious desire of the states, its partners in American federalism, to experiment in this area.

> That the States pressured the federal government to turn the low-level waste dilemma over to them fully reflects the resurgence of the States as political actors within the drama of American federalism.

Kearney and Stucker, *Interstate Compacts and the Management of Low-Level Radioactive Waste*, 45 Public Administration Review 218 (1985).

In addition to promoting experimentation, federalism increases the opportunity of the states to participate in governing.

> It is incontestably true that the love and habits of republican government in the United States were engendered in the townships and in the provincial assemblies. [I]t is this same republican spirit, it is these manners and customs of a free people, which are engendered and nurtured in the different States, to be afterwards applied to the country at large.

1 A. de Tocqueville, *Democracy in America* 181 (H. Reeve trans. 1961).

> In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controulled by itself.

The Federalist No. 51, at 351 (J. Madison) (J. Cooke ed. 1961).

The states thus retain substantial sovereign authority under our constitutional system. *See Gregory v. Ashcroft*, ___ U.S. ___, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). Surely the states, under our system of dual sovereignty to which Madison and de Tocqueville were referring, retain the sov-

ereign right to take control of and responsibility for a national problem which affects state and local interests when the states unanimously agree on a solution to that problem.

"It may safely be received as an axiom in our political system, that the state governments will in all possible contingencies afford complete security against invasions of the public liberty by the national authority." The Federalist No. 28, at 179-80 (A. Hamilton) (J. Cooke ed. 1962). While the states have been successful in working through their own executive, legislative, and judicial branches to thwart national policies with which they disagree, there is evidence that at least in some policy fields, such as low-level nuclear waste management, the states are acting in a progressive manner in confronting the problems which face them, and insisting on the right to participate more actively in making national policies which promote and protect what the states perceive to be in their best interests. Kearney and Gary, *American Federalism and the Management of Radioactive Wastes*, 42 Public Administration Review 14-24 (1982). The 1980 Act and its 1985 Amendments are models of the resurgence of the states as political actors in the American federal system.

B. The Political Process Test of Garcia.

The Second Circuit Court of Appeals, below, properly deferred, under the Tenth Amendment and principles of federalism, to the agreement of all the states, including New York, which supported the national political process in creating the Low-Level Radioactive Waste Policy Amendments Act of 1985. New York fails to show that the Second Circuit is out of step with Tenth Amendment analysis of its sister circuits or this Court.

The Tenth Amendment limits on Congress' authority to regulate the states were set out by this Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). "*Garcia* holds that the [Tenth Amendment limits on Congress' authority to regulate state activities] are structural, not substantive, *i.e.*, that states must find their pro-

tection from Congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." *South Carolina v. Baker*, 485 U.S. 505 (1988).

This Court in *South Carolina v. Baker* went on to state that

> although *Garcia* left open the possibility that some extraordinary defects in the national political process might render Congressional regulation of activities invalid under the Tenth Amendment, * * * nothing in *Garcia* or the Tenth Amendment authorizes courts to second guess the substantive basis for legislation. Where * * * the national political process did not operate in a defective manner, the Tenth Amendment is not implicated.

Id. at 512-513. This court observed that

> South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless.

Id.

The several Circuits of the Court of Appeals have not found it difficult to apply the *Garcia* test. The United States Court of Appeals for the Ninth Circuit recently construed the Tenth Amendment consistent with both *Garcia* and *Baker* in a case dealing with the siting of a disposal site for high-level nuclear waste in *Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1105 (1991). In that case, Nevada argued that

> because Nevada was not represented on the House and Senate Conference Committee on the Omnibus Budget Reconciliation Act of 1987 when the 1987 [Nuclear Waste Policy Act] amendments were approved, it was deprived of its 'right to participate in the national political process' and 'was singled out in a way that left it politically isolated and powerless.'

Id. at 1556 (quoting Petitioners' Opening Brief at 40, quoting *South Carolina v. Baker*, 485 U.S. at 512).

The Ninth Circuit Court of Appeals rejected Nevada's arguments and focused on the national political process in the factual setting presented:

> Nevada cannot point to any defect in the political process that led to the enactment of the 1987 NWPA Amendments. As the Secretary points out, the Tenth Amendment does not protect a state from being outvoted in Congress. * * * Nor can Nevada complain that its lack of representation on the Conference Committee created a defect in the political process. To the extent that Nevada asserts that lack of representation created a defect in the political process as contemplated by *South Carolina v. Baker*, it cannot succeed in light of the plenary consideration given to the Omnibus Budget Reconciliation Act of 1987.

Id. at 1556-1557.

Based on the foregoing, it is clear that *Garcia* properly limits courts to an examination of the national political process "in the factual setting" presented, in order to determine whether Congress has transgressed the Tenth Amendment in the exercise of its Commerce Clause powers. *See Garcia*, 469 U.S. at 556. That is, *Garcia* permits a procedural examination of the national political process and not a substantive review of Congressional actions under a *Garcia* exception.

In this case, rather than being denied the opportunity to participate in the national political process, the state of New York actively sought the legislative consensus that became the 1985 Amendments Act.[27] The specific views of the state of New York were aired during Congressional hearings on the Act. In particular on March 7, 1985, Mr. Charles R. Quinn, Deputy Commissioner for Policy and Planning of the New York State Energy Office, testified

---

[27]The states' agreement embodied in the 1985 Amendments Act and 1980 Act distinguishes this case from *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1979), *vacated and remanded for consideration of mootness sub nom. EPA v. Brown*, 431 U.S. 99 (1977). In the EPA case there was no evidence that the states, as sovereigns, had consented to the challenged EPA regulations.

> New York State supports the efforts * * * to resolve the current impasse over Congressional consent to the proposed low-level radioactive waste compacts * * * New York State has been participating with the National Governors Association * * * in an effort to * * * reach a consensus between all groups.[28]

According to Mr. Quinn's testimony, one of the "major points which [New York] believes must be incorporated within any Congressional Act on this matter" was "appropriate penalties * * * for failure to meet designated milestones."[29]

The take-title penalty provision was devised by the Senate Environment and Public Works Committee and accepted by the NGA and the states.[30] New York State was not isolated when Congress added that provision to the 1985 Low-Level Radioactive Waste Policy Amendments Act. Senator Moynihan of New York was a member of that committee. Just before passage of the 1985 Amendments Act, Senator Moynihan strongly supported the bill

> Mr. President, the low-level nuclear waste bill before us is a well-balanced compromise, and a most necessary one. Without clear action by the Congress, the governors of the three states that have been disposing of all of our commercial low-level nuclear waste have threatened to shut down the disposal sites in their states. I cannot say that I blame them. * * *
>
> I am pleased to report that this complex bill meets those conflicting needs very well. * * *

---

[28]Amendments to the Federal Low-Level Radioactive Waste Policy Act of 1985: Hearings on HR 1083 before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs, 99th Cong., 1st Sess. 197 (1985).

[29]*Id.* at 197-198

[30]Although the Petitioners challenge the Amendments Act as a whole, they focus especially on the "take title provision," 42 U.S.C. § 2021e(d)(2)(C) which requires States to take title to the waste if they have not made arrangements for a disposal site by January 1, 1996. *See* 131 Cong. Rec. S38405.

> The timetables required by this measure are firm and realistic. It is indeed an equitable approach for all concerned, and I am pleased to support it.[31]

No member of the New York State Congressional Delegation opposed the provision, and the bills containing the take-title provision were unanimously passed by both the Senate and the House by voice vote. The state of New York cannot seriously argue that the 1980 Act and its 1985 Amendments, which were the very model of federalism in action, are now somehow defective under the Tenth Amendment.[32]

POINT II

THE "TAKE TITLE" PROVISION OF THE AMENDMENTS ACT IS NOT INDISPENSABLE TO THE REGIONAL DISPOSAL SOLUTION ENVISIONED BY THE STATES AND IS THEREFORE SEVERABLE FROM THE REMAINDER OF THE AMENDMENTS ACT.

While the sited states do not concede that the "take title" provision is constitutionally defective, the provision should be severed from the 1985 Amendments Act should this Court conclude that it violates some principle of federalism. New York contends that the 1985 Amendments Act is inseverable because it contains no severability clause and therefore the 1985 Act must be struck down, as a whole, if any provision is declared unconstitutional. The traditional standard for determining severability was recently affirmed by this Court:

> Unless it is evident that the Legislature would not have enacted those provisions which are within its

---

[31]131 Cong. Rec. S38423.

[32]Even if this Court were inclined to revisit *Garcia* and *Baker*, in light of the State origins of the 1980 Act and its 1985 Amendments, based on principles of federalism, this case does not present a good vehicle to do so. In addition, considering the traditional regulation of nuclear matters by the national government and the pervasive nature of the problem of radioactive waste management and disposal, these Acts meet the substantive test of *National League of Cities*.

> power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (citations omitted). Courts give little weight to the presence or absence of a severability clause and tend to focus on other matters:

> We think the question where the presumption lies [without a severability clause] is mostly irrelevant, and serves only to obscure the crucial inquiry whether Congress would have enacted other portions of the statute in the absence of the invalidated provision.

Consumer Energy, Etc. v. F.E.R.C., 673 F.2d 425, 442 (D.C. Cir. 1982) (hereinafter, "*FERC*"). A recent decision from the Second Circuit went even further, adhering to this Court's plurality that there exists a presumption in favor of severability even without a severability clause:

> Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability.

Carlin Communications, Inc. v. F.C.C., 837 F.2d 546, 561 (2d Cir. 1988), (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984)).

A review of recent cases demonstrates that the provisions of the 1985 Act do not make it "evident" that Congress would not have passed the Act without the "take title" provision. One of the most fertile fields of severability jurisprudence has been the legislative veto litigation following this Court's decision in *I.N.S. v. Chadha*, 462 U.S. 919 (1983). *Chadha* struck down the provision of the Immigration and Nationality Act allowing a one-house veto of the Attorney General's decision not to deport an otherwise deportable alien. This Court found that the remainder of the Act was "fully operative as law" and a "workable administrative mechanism," which supported the conclusion that the veto provision was severable. *Id.* at 934-935.

More recently, this Court followed its holding in *Chadha* by striking down a legislative veto provision in

Alaska Airlines, supra, related to the Employee Protection Plan of the Airline Deregulation Act of 1978. In considering whether Congress would have passed the Act without the veto, this Court thought the nature of the delegation governed by the veto was important: the broader or more controversial the delegation, the more likely Congress would want to retain control with a veto. *Alaska Airlines*, 480 U.S. at 685. Thus, striking down the legislative veto actually increased the delegation of authority. This Court's assumption in *Alaska Airlines* seemed to be that Congress was more willing to enact mild rather than radical legislation. This assumption also appears in *McCorkle v. United States*, 559 F.2d 1258, 1261 (4th Cir. 1977):

> When the questioned clause restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent.

This line of reasoning supports a finding of severability in the present case. The 1985 Amendments Act is certainly less radical or controversial without the "take title" provision; if anything, the Act without the provision would be *more* likely to pass muster with the states because it would contain milder enforcement provisions than the actual 1985 Act.

A similar line of inquiry appears in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), which struck down part of Washington State's moral nuisance law as overbroad because it included "lust" as part of "prurient interests." The Court gave "lust" a limiting construction to exclude normal interest in sex. *Id.* at 504-505. The Court reasoned:

> It would be frivolous to suggest, and no one does, that the Washington Legislature, if it could not proscribe materials that appealed to normal as well as abnormal sexual appetites, would have refrained from passing the moral nuisance statute. And it is quite evident that the remainder of the statute retains its effectiveness as a regulation of obscenity. In these circumstances, the issue of severability is no obstacle to partial invalida-

> tion, which is the course the Court of Appeals should have pursued.

Id. at 506-507. Like the over-broad use of "lust" in the Washington statute, if the "take title" provision of the 1985 Act is found to exceed constitutional boundaries, it is reasonable to assume that Congress would have passed the Act within constitutional limits. Since the 1985 Act is a workable administrative mechanism without the "take title" provision, the "take title" provision is therefore severable.[33]

In *United States v. Jackson*, 390 U.S. 570, 586 (1968), the capital punishment provision of the Federal Kidnapping Act was ruled unconstitutional but severable from the remainder of the Act because "its elimination in no way alter[ed] the reach of the statute and [left] completely unchanged its basic operation." To further drive home the distinction between substantive provisions and penalties, the court stated:

> [I]t is not to be presumed that the legislature was legislating for the mere sake of imposing penalties, but the penalties * * * were simply in aid of the main purpose of the statute. They may fall, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment.

Id. at 1219, n.28 (quoting *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 396 (1894).

As in *Jackson*, the "take title" and state liability provision is not essential to the 1985 Act's administration. Unsited states may have a lesser incentive to provide for their own low-level radioactive waste disposal in the absence of the "take title" provision, but the impact of this provision should not be over-emphasized. Even without the "take title" provision, the 1985 Act provides and has provided powerful incentives to participate in regional compacts and to

---

[33]The legislative history of the 1985 Amendments Act also favors severability of the "take title" provision. "Because the provision comes in only 1996 * * *, it is intended that the provision be severable from the rest of the act, should it be found unconstitutional." 131 Cong. Rec. H38117 (1985) (statement of Rep. Markey).

site a low-level waste disposal facility. First, the penalty surcharges encourage waste generators to reduce the amount of waste they send to disposal sites. More importantly, the prospect of losing disposal rights in Washington, Nevada, and South Carolina after 1992 generates significant public health, economic, and political pressure to find new disposal solutions. The political fallout resulting from radiation hazards or idled utilities may not be appreciably different whether or not the state is holding title to the waste, and therefore the impetus to develop disposal sites is not destroyed even if the "take title" and state liability provision is stricken.

In any event, New York's challenge to the "take title" provision is not ripe. The take title penalty provision does not become operative until four years from now in 1996. Any analysis of the constitutional implications of that provision at this point is pure speculation.

POINT III

NEW YORK'S CHALLENGE TO THE 1980 AND 1985 CONSENSUS OF THE STATES IS A RETREAT FROM THE STATES' RESURGENT ROLE IN THE AMERICAN SYSTEM OF FEDERALISM.

New York's constitutional challenge to the 1980 Act and its 1985 Amendments is a betrayal of the states' consensus to be responsible for the management of low-level radioactive wastes on the state and local level for reasons of federalism. This action is an attempt to continue to reap the benefits of the compromise agreement by the sited states to continue to accept out-of-region wastes until 1993, without New York accepting the burdens of developing waste disposal capacity to which it had agreed in 1980 and reaffirmed in 1985. The state of New York licenses the use of radioactive materials for various beneficial uses as an agreement state under the Atomic Energy Act. New York obtains the benefits of the use of these nuclear materials, and pursuant to the

1985 Amendments Act continues to shift the burden of disposal onto the sited states.

This is the essential dilemma of radioactive waste management policy. The benefits of nuclear technologies are broadly distributed throughout society. The costs of dealing with the effluents of these technologies are highly concentrated. Radioactive waste disposal sites are ultimately established in some community's backyard. Waste disposal is indeed a land use problem, and land use problems are not something the national government is very effective in resolving. This is the essential reason the states took the responsibility for low-level radioactive waste management upon themselves under the 1980 Act and its 1985 Amendments.

New York would betray the compromise agreed to by the states in 1985 to equitably share that burden. This agreement was incorporated into the 1985 Amendments Act. If the 1980 and 1985 agreements are to be revisited, the proper fora for such a process is among the states' elected Governors in the National Governor's Association, the state legislatures in the National Conference of State Legislatures, and their elected representatives in Congress and not the federal courts.

> Negotiation and agreement with congressional, rather than judicial, supervision has long been the preferred method, provided by the Constitution, for resolution of interstate and sovereign disputes. When reviewing the complex provisions of the [1985 Amendments Act], courts should take particular note of this traditional preference.[34]

The 1985 Amendments Act is a fair and reasonable compromise developed by and for the states and enacted through the national political process. New York fails to show that they were denied an opportunity to participate in the national political process that brought about the legisla-

---

[34]Berkovitz, *Waste Wars: Did Congress Nuke State Sovereignty in the Low-Level Radioative Waste Policy Amendments Act of 1985?*, 11 Harvard Env. L. Rev. 437, 475-476 (1987).

tion at issue. In fact the evidence is clear that New York actively sought and supported the agreement among the states. New York also fails to show that the Second Circuit Court of Appeals inconsistently applied the *Garcia* and *Baker* tests.

The 1980 Act and its 1985 Amendments represent not commands of Congress to the states, but commitments made among sovereign states by and for the states. New York has obtained the benefits from the bargain it voluntarily entered into in 1980 and endorsed again in 1985 with all the other states. New York has retained access to the sited states' disposal facilities and it has received surcharge rebates to pay for the construction of its own facility. New York also retains the right to enter into a compact or arrangement with other states to assist in the management of its waste. The sovereign states of Washington, Nevada, and South Carolina are only ten months from fulfilling their promises to continue to be national disposal sites until a time certain. These States have borne the burden of being national disposal sites long enough.[35] It is time for New York to be held to its twelve year old voluntary commitment to manage its own low-level radioactive waste.

The 1980 Act and its 1985 Amendments are paragons of federalism. The Tenth Amendment does not prohibit states from agreeing among themselves to solve a national waste disposal problem. The 50 sovereign United States participated in the state and national political process to forge a consensus to solve a serious problem that affects all the states—the safe disposal of low-level radioactive waste.

CONCLUSION

The judgment of the Second Circuit should be affirmed, and the 1980 Act and its 1985 Amendments should be de-

---

[35]Nevada's disposal site has been open for 30 years. The Hanford facility in Washington has been open for 27 years. South Carolina has taken low-level radioactive waste for disposal for 21 years.

clared constitutional in their entirety. However, if any provision is found to be constitutionally defective it should be severed from the balance of the Acts.

DATED this 3rd day of March 1992.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General
State of Washington

T. TRAVIS MEDLOCK
Attorney General
State of South Carolina

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

ALLEN T. MILLER, JR.*
Assistant Attorney General
for Washington
Special Deputy Attorney
General for Nevada

JAMES PATRICK HUDSON
Deputy Attorney General
for South Carolina
* *Counsel of Record*